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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

11 JOHN H. GIORDANO and GEORGANA)	Case No.: CV10-4661-JF (PVT)
12 G. GIORDANO,)	
13 Plaintiffs,)	PLAINTIFFS' OPPOSITION TO
14 vs.)	WACHOVIA'S MOTION TO DISMISS
15)	PLAINTIFFS' FIRST AMENDED
16 WACHOVIA MORTGAGE, FSB;)	COMPLAINT; MEMORANDUM OF
17 WELLS FARGO, N.A; ETS SERVICES,)	POINTS AND AUTHORITIES
18 LLC and DOES 1 to 100, inclusive,)	Date: March 25, 2011
19 Defendants.)	Time: 9:00 a.m.
	Crtm: 3
	Honorable Jeremy Fogel

20 JOHN H. GIORDANO and GEORGANA G. GIORDANO ("Plaintiffs") hereby oppose
21 the Motion to Dismiss Plaintiffs' First Amended Complaint filed by Defendant, Wachovia
22 Mortgage, a division of Wells Fargo Bank, N.A., sued as "Wells Fargo, N.A." f/k/a Wachovia
23 Mortgage, FSB and f/k/a/ World Savings Bank, FSB.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I.**

26 **RELEVANT FACTS**

27 As alleged in Plaintiffs' First Amended Complaint ("FAC"), in December 2005,
28 Plaintiffs entered into a contract to refinance certain real property located at 1136 Speciale Way,

1 San Jose, California 95125 (the "Subject Property") using World Savings Bank, FSB ("WSB")
2 as the lender. At the time that Plaintiff, John H. Giordano was 78 years old and Plaintiff,
3 Georgana G. Giordano was 60 years old. WSB represented to Plaintiffs that based on their credit
4 score and the current market conditions that they had qualified and had obtained a loan with very
5 favorable terms. Specifically, WSB told Plaintiffs they had obtained a 30-year fully-amortized
6 adjustable rate mortgage ("ARM") with an initial annual interest rate of 6.710%.

7 Plaintiffs believed the representations of WSB. Unfortunately, those representations
8 were false and the true terms of the loan agreement are significantly different than the terms
9 represented by WSB. The true terms are as follows: WSB gave Plaintiffs a 30-year "pick-a-
10 payment" ARM with a 2-month "teaser" interest rate at 6.710%. Thereafter the interest rate is
11 adjustable based on the GDW Average Deposit Account Rate (COSI) plus 3.500%, with a cap at
12 11.950%. Plaintiffs' loan included a negative amortization feature and a predatory and illegal
13 prepayment penalty provision.

14 Plaintiffs believed that they had obtained a 30-year fully-amortized ARM with an initial
15 annual interest rate at 6.710%. These are the terms Plaintiffs agreed to and believed were
16 embodied in the loan agreement, as represented by WSB. Plaintiffs were unaware that the loan
17 included a negative amortization feature and an illegal and predatory prepayment penalty.
18 Plaintiffs were also unaware that the 6.710% disclosed interest rate would adjust before
19 Plaintiffs' made their first payment; this disclosed interest rate was never actually applied to
20 Plaintiffs' loan. The disclosure of an initial interest rate at 6.710% was misleading at best and
21 fraudulent at worst.

22 These features were not explained to Plaintiffs, who relied on WSB – their agent – to
23 explain the voluminous packet of loan documents and terms. Instead, a huge stack of loans
24 documents were produced and Plaintiffs were instructed to immediately sign each document.
25 Plaintiffs, being elderly and unsophisticated borrowers, relied on WSB – their agent – to explain
26 the voluminous packet of loan documents. However, WSB failed to do so. Plaintiffs allege and
27 believe that due to their advanced age and apparent naivety as to real estate and borrower
28 qualifications, WSB recognized Plaintiffs' weaknesses and preyed upon the opportunity to

1 benefit from Plaintiffs' age and lack of knowledge.

2 In 2009, Plaintiffs began to experience severe financial problems due in part to the
3 increasing interest rate and mortgage payments and began to struggle to make their monthly
4 mortgage payments. It was not until this point in time that Plaintiffs began to suspect that the
5 true terms and conditions of the loan agreement were significantly different than the terms
6 previously represented by WSB.

7 On August 11, 2009, a Notice of Default ("NOD") was recorded by ETS, acting as the
8 agent of Beneficiary. On November 12, 2009 a Notice of Trustee's Sale ("NOS") was recorded
9 by ETS, the foreclosing Trustee. After receiving a copy of the NOS, Plaintiffs contacted
10 WACHOVIA to ask about options available for assistance with their mortgage payment or if
11 they could receive a loan modification. Without assessing their financial situation or exploring
12 other alternatives to foreclosure, WACHOVIA simply told Plaintiffs to submit a loan
13 modification application and documents verifying their current financial circumstances.

14 Plaintiffs promptly complied with WACHOVIA's request by submitting a loan
15 modification application and documents verifying their current financial circumstances.
16 Plaintiffs contacted WACHOVIA each and every month thereafter to check on the status of their
17 loan modification application. Each time Plaintiffs contacted WACHOVIA, they were told their
18 application was still under review. Accordingly, Plaintiffs had every reason to believe and
19 expect that their application for a loan modification would be approved and was forthcoming.

20 After hearing nothing, Plaintiffs contacted WACHOVIA in May 2010 to check on the
21 status of their application. Despite Plaintiffs' performance of all the required conditions,
22 WACHOVIA told Plaintiffs that their application for a loan modification had been denied.

23 II

24 STANDARD OF REVIEW

25 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.
26 The court must decide whether the facts alleged would entitle plaintiffs to some form of legal
27 remedy. Unless the answer is unequivocally "no," the motion must be denied. (*Conley v.*
28 *Gibson* (1957) 355 US 41, 45-46; *De La Cruz v Tormey* (9th Cir. 1978) 582 F2d 45, 48; *SEC v.*

1 *Cross Fin'l Services, Inc.* (CD CA 1995) 908 F. Supp. 781, 726-727.) The court must "accept as
2 true all of the factual allegations set out in plaintiff's complaint, draw inference from those
3 allegation in the light most favorable to plaintiff, and construe the complaint liberally."
4 (*Rescuecom Corp. v. Google, Inc* (2nd Cir. 2009) 562 F3d 123, 127; *Scott v. Ambani* (6th Cir.
5 2009) 577 F3d 642, 646.) No matter how improbable the facts alleged are, they must be
6 accepted as true for purposes of the motion. (*Bell Atlantic Corp. v. Twombly* (2007) 550 US 544,
7 556; *Berheim v. Litt* (2nd Cir. 1996) 79 F3d 318, 321 – recovery may seem remote and unlikely
8 on the face of the pleading, but that is not the test for dismissal.)

9 III

10 ANALYSIS AND APPLICATION

11 A. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED BY THE HOMEOWNERS' 12 LOAN ACT.

13 The Homeowner's Loan Act ("HOLA") does not preempt Plaintiffs' causes of action. A
14 private right of action may inhere within a statute, otherwise silent on the point, when such a
15 private right is necessary to achieve the statute's policy objectives. (*Cannon v. University of*
16 *Chicago* (1979) 441 US 677, 683.) The process of foreclosure has traditionally been a matter of
17 state real property law. (*Mabry v. Supr. Ct. (Aurora)* (2010) 185 Cal.App. 4d 230-231; citing
18 *BFP v. Resolution Trust Corporation* (1994) 511 US 531, 541-542. "Historically, real property
19 law has been the exclusive domain of the states.")

20 Under HOLA, the Federal Office of Thrift Supervision ("OTS") issued section 560.2 of
21 title 12 of the Code of Federal Regulations ("C.F.R.") a regulation that itself delineates what is a
22 matter for federal regulations, and what is a matter for state law. Specifically, 12 C.F.R.
23 §560.2(c) provides, that "state laws of the following types are not preempted to the extent that
24 they only incidentally affect the lending operations of federal savings associations ...2) real
25 property law...4) tort law." 12 C.F.R. §560.2(c). With this in mind, HOLA does not preempt
26 Plaintiffs' claim for financial elder abuse because it is an intentional tort committed by WSB.
27 Thus, HOLA does not preempt Plaintiffs' cause of action for Unfair Business Practices, because
28 Plaintiffs' cause of action for Financial Elder Abuse is incorporated therein.

1 **B. PLAINTIFFS HAVE ALLEGED FACTS SUFFICIENT TO MAINTAIN A CAUSE**
2 **OF ACTION FOR FINANCIAL ELDER ABUSE.**

3 The California Legislature enacted the Elder Abuse Act, Cal. Welf. & Int. Code §§
4 15600-15675, “to protect elders by providing enhanced remedies which encourage private, civil
5 enforcement of laws against elder abuse and neglect.” (*Negrete v. Fid. & Guar. Life Ins. Co.*
6 (2006) 444 F.Supp.2d 988, 1001.) Financial elder abuse occurs when a person or entity:

7 “(1) Takes, secretes, appropriates, or retains real or personal property of an elder or
8 dependant adult to a wrongful use or with intent to defraud, or both. (2) Assists in taking,
9 secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a
10 wrongful use or with intent to defraud, or both.” Cal.Welf. & Inst. Code §15610.30(a)(1)-(2).

11 A person or entity is “deemed to have taken, secreted, appropriated, or retained property
12 for a wrongful use if, among other things, the person or entity takes, secrets, appropriates or
13 retains possession of property in bad faith.” Cal. Welf. & Inst. Code §15610.30(b). A person or
14 entity “is deemed to have acted in bad if the person or entity knew or should have known that the
15 elder... has the right to have the property transferred or made readily available to the elder.” Cal.
16 Welf. & Inst. Code §15610.30(b)(1).

17 To utilize the Elder Abuse Act’s enhanced remedies, a plaintiff must prove “by clear and
18 convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or
19 malice in the commission of the abuse.” Id. §§15657.5(b) and 15657.5 (a). In this case, WSB
20 solicited Plaintiffs to refinance the Subject Property. WSB paid itself \$11,000 in fees, which it
21 wrongfully obtained as a result of WSB’s false representations about the true terms of the loan,
22 which WSB knew to be false and significantly different than the terms which Plaintiffs agreed to
23 and believed were embodied in the loan agreement. WSB did not orally disclose to Plaintiffs
24 that the true terms of the loan were significantly different than the terms previously represented.
25 Rather, WSB handed Plaintiffs a huge stack of documents and told Plaintiffs where to sign.

26 Under California law, when brokering a loan for a borrower of “modest means and
27 limited experience in financial affairs,” a broker has “duties of oral disclosure and counseling
28 which requires brokers to disclose orally the true rate of interest, the penalty for late payments or

1 other material terms of the loan.” (*Zimmer v. Nawabi* (2008) 566 F.Supp.2d 1032; citing *Wyatt v.*
2 *Union Mortgage Co.* (1979) 24 Cal.3d 773, 782 (such borrowers may be assumed to have
3 justifiably relied on the broker’s expertise.)) Defendants did not broker the loan. However,
4 Plaintiffs had no need to retain a mortgage broker because they were directly solicited by WSB
5 to refinance the Subject Property. Defendants should not be permitted to escape liability because
6 they now claim that they were not Plaintiffs’ agent.

7 This cause of action is also not time-barred. California Welfare and Institutions Code
8 §15657.7 provides, as follows:

9 “An action for damages pursuant to Sections 15657.5 and 15657.6 for financial abuse of
10 an elder or dependant adult, as defined in Section 15610.30, shall be commenced within
11 four years after the plaintiff discovers ~~or~~, through the exercise of reasonable diligence,
12 **should have discovered**, the facts constituting the financial abuse.” [Emphasis Added.]

13 As stated above, in 2009, Plaintiffs began to experience severe financial problems due in
14 part to the increasing interest rate and mortgage payments and began to struggle to make their
15 monthly mortgage payments. When they started having severe financial problems, Plaintiffs
16 began to suspect that the true terms of the loan agreement were significantly different than the
17 terms represented by WSB: that’s when Plaintiffs learned that they had been lied to. Therefore,
18 Plaintiffs’ claim does not expire until December of 2013. For all of these reasons, the Court
19 should deny Defendants’ Motion to dismiss this cause of action.

20 **C. PLAINTIFFS HAVE ALLEGED FACTS SUFFICIENT TO MAINTAIN A CAUSE**
21 **OF ACTION FOR UNFAIR BUSINESS PRACTICES.**

22 Plaintiffs’ second cause of action for unfair business practices is not time-barred for the
23 same reasons that Plaintiffs’ claim for financial elder abuse is not time barred. As stated above,
24 Plaintiff’s claim for financial elder abuse is not time-barred because it wasn’t until late 2009 that
25 Plaintiffs discovered that the true terms of the loan agreement were significantly different than
26 the terms Plaintiffs agreed to and believed were embodied in the loan agreement, as previously
27 represented by WSB. Thus, Plaintiffs’ claim does not expire until December 2013.

28 In addition, Plaintiffs have standing to maintain this cause of action because they have

1 suffered injuries including, but limited to, paying WSB unearned and undisclosed fees in excess
2 of \$11,000. WSB wrongfully obtained these fees as a result of WSB's false statements about the
3 true terms of the loan, which WSB knew to be false and significantly different than the terms
4 which Plaintiffs agreed to and believed were embodied in the loan agreement. For all of these
5 reasons, Plaintiffs have alleged facts sufficient to maintain their second cause of action and the
6 Court should deny Defendants' Motion to Dismiss this cause of action.

7 **C. PLAINTIFFS SHOULD BE GIVEN LEAVE TO AMEND**

8 Leave to amend should almost always be granted by the court on an initial motion to
9 dismiss. FRCP 15(a) expressly states leave to amend "shall be freely given when justice so
10 requires." (FRCP 15(a); *Allen v. City of Beverly Hills* (9th Cir. 1990) 911 F2d 367, 373;
11 *Friedlander v. Nims* (11th Cir. 1985) 755 F2d 810, 813.) FRCP 15(a) severely restricts the
12 court's discretion to dismiss without leave to amend. Where a more carefully drafted complaint
13 *might* state a claim, a plaintiff *must be given a* chance to amend the Complaint before the district
14 court dismisses the action with prejudice. (*Silva v. Bieluch* (11th Cir. 2003) 351 F3d 1045, 1048;
15 *DeCarlo v. Fry* (2nd Cir. 1998) 141 F3d 56, 62.)

16 **IV.**

17 **CONCLUSION**

18 For all the foregoing reasons, Plaintiffs, John H. Giordano and Georgana G. Giordano,
19 respectfully request that the Court deny the Motion to Dismiss filed by Defendant, Wachovia
20 Mortgage, a division of Wells Fargo Bank, N.A., sued as "Wells Fargo, N.A." f/k/a Wachovia
21 Mortgage, FSB and f/k/a World Savings Bank, FSB. In the event that the Court grants the
22 Motion to Dismiss, Plaintiffs request leave to amend.

23
24 Dated: March 15, 2011

25 <S> Stephen C. Ruehmann, Esq.

26 Attorney for Plaintiffs

27 John H. Giordano and Georgana G. Giordano
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